INDEX.

PAGE

Questions Presented 1

Statement of Facts 2

Summary of Argument 4

Argument:

I—The arrest and search of George McCray and the subsequent seizure of contraband from him was constitutionally valid for it was predicated upon information supplied to the arresting officers by a reliable informant 5

A. *An arrest is clearly valid when predicated on the information of a reliable informant, which is based on fact, and is corroborated by the surrounding circumstances* 5

B. *The arrest and search of George McCray was valid for it was predicated upon corroborated information supplied by a reliable informant* 8

II—The State was not required to divulge the identity nor produce the informant under the circumstances in this case 12

A. *The state is not required to divulge the identity of an informant where he has not participated in the perpetration of the crime and the accused is charged with possession of narcotics* 12

B. *The state should not be required to disclose the name of the informer, in this case, for the standards set forth by this Court are based upon sound public policy and are fully satisfied* 15

III—The Search of the petitioner subsequent to his valid arrest was lawful 21

Conclusion 22

STATUTES CITED.

18 U.S.C. §§ 3052, 3056 ..... 6, 10
Rule 41, Federal Rules of Criminal Procedure 6, 10
Ill. Rev. Stat. 1963, ch. 38, par. 107 6

TEXT CITED.

Harney and Cross, *The Informer In Law Enforcement,* (1960). 16, 18

CASES CITED.

Arwine v. Baunan, 346 F. 2d 458 (C.A. 6th, 1965), *cert. den.* 382 U.S. 882 11
Aguilar v. Texas, 378 U.S. 108, 114 ...4, 6, 7, 14, 15, 16, 17
Carbo v. United States, 288 F. 2d 686 (C.A. 9th, 1961) *cert. den.* 365 U.S. 861 17
Carbo v. United States, 82 S. Ct. 662, 7 L. Ed. 2d 769, review denied, 369 U.S. 868 17
Cardarella v. United States, 371 U.S. 819 17
Dailey v. United States, 261 F. 2d 870 (C.A. 5th, 1958) *cert. den.* 359 U.S. 969 11
Draper v. United States, 358 U.S. 307, 311 ..... 4, 5, 6, 11
Ferina v. United States, 302 F. 2d 95 (C.A. 8th, 1962) *cert. den. sub. nom.* 17

Garibay-Garcia v. United States, 362 F. 2d 509 (C.A. 9th, 1966) 13
In re Quarles and Butler, 158 U.S. 532 12
Ker v. California, 374 U.S. 23, 34 6
Miller v. United States, 273 F. 2d 279 (C.A. 5th, 1959), *cert. den.*, 362 U.S. 298 (1960) 13
Mulligan v. United States, 358 F. 2d 604 (C.A. 8th, 1966) 11
Odom v. United States, 116 F. 2d 996 (C.A. 5th, 1941), reversed 313 U.S. 544 17
Pegram v. United States, 267 F. 2d 781 (C.A. 6th 1959) 13
Roviaro v. United States, 353 U. S. 53, 62, 66 ..... 4, 12, 13, 18, 21
Rugendorf v. United States, 376 U. S. 528 ..... 4, 14
Scher v. United States, 305 U. S. 251 12
Schuster v. City of New York, 5 N. Y. 2d 75, 154 N. E. 2d 534 (C.A. N.Y. 1958) 17
United States v. Bando, 244 F. 2d 833 (C. A. 2d 1957) *cert. den.* 355 U. S. 884 17
United States v. D'Angiolillo, 340 F. 2d 453 (C.A. 2nd, 1965), *cert. denied* 380 U. S. 955 (1965) 13
United States ex rel. Drew v. Meyers, 327 F. 2d 174 C.A. 3rd, 1964) *cert. denied*, 379 U. S. 847 (1964) .. 13
United States v. Howard, 228 F. Supp. 939 (U.S. D.C., Nebr. 1964) 17
United States v. Koingsberg, 336 F. 2d 844 (C.A. 3rd, 1964), *cert. den.*, 379 U. S. 933 (1964) 13
United States v. Paroutian, 319 F. 2d 66 (C. A. 2nd, 1964), *cert. den.*, 375 U. S. 981 17
United States v. Rabinowitz, 339 U. S. 56 11
United States v. Sanders, 325 F. 2d 840 (C. A. 6th, 1964) 17

United States v. Ventresca, 380 U. S. 102 ..... 4, 15
Vogel v. Grauz, 110 U. S. 311 12
Weeks v. United States, 232 U. S. 383, 392 5
Williams v. United States, 273 F. 2d 781 (C. A. 9th, 1960), *cert. den.* 362 U. S. 951 (1960) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966

NO. 159

GEORGE McCRAY,

Petitioner,

vs.

ILLINOIS,

Respondent.

(On Writ of *Certiorari* to the Supreme Court of the State of Illinois.)

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

1) Whether the arrest of George McCray and the subsequent search and the seizure of narcotics from him was constitutionally permissible where it was predicated upon information supplied to arresting officers by a reliable informant?

2) Whether the State is required to disclose the identity of a reliable informant and produce that informant at the trial where the informant did not participate in the crime of possession of narcotics of which the petitioner is charged?

3) Whether the manner in which the search of George McCray was conducted was such that it was shocking to the conscience?

STATEMENT OF FACTS.

The Statement of Facts contained in the brief for the Petitioner (Br. 4-5) is incomplete. It is therefore necessary for the Respondent to restate the facts.

George McCray, petitioner, was arrested for possession of narcotics on January 16, 1964 at 7:00 A. M. in the vicinity of 49th Street and Calumet Avenue in Chicago, Illinois (Tr. 16). His arrest was based upon information supplied by an informer, who told the arresting officers he had just observed McCray selling narcotics in the area (Tr. 18-19).

Prior to the trial, the petitioner filed a motion to suppress the narcotics taken from him pursuant to his arrest and subsequent search (Tr. 3-5).

At the hearing on the motion to suppress, McCray testified that at about 5:30 A. M. on January 16, 1964, he was arrested in the vicinity of 49th and Calumet (Tr. 6). He stated that the officers took off his coats and then had him completely undress in the squad car prior to making him get out of the car in very cold weather with only his pants half on and in his underclothes (Tr. 7). He testified that at that time the officer showed him a cigarette package with some tin foil in it. He alleged that it was not his. A few statements later, he admitted the

cigarette package was his and that whatever was in it belonged to him (Tr. 7).

McCray further testified that a half hour before being arrested at 5:30 A. M he had been at a friend's house at 48th and Forestville (Tr. 7). He did not identify the friend nor produce him at the hearing as a witness.

Both Officers Jackson and Arnold testified that they had known the informant for over a year (Tr. 8, 15) and that he had supplied them with information concerning narcotics activities which had resulted in numerous arrests and convictions (Tr. 8, 12, 13, 14, 15).

Approximately ten minutes later, after cruising the immediate vicinity, the officers and the informant saw the petitioner at 48th and South Park Avenue (Tr. 10). The informant pointed out the defendant and got out of the car and left (Tr. 10). The officers then followed McCray into an alley at approximately 49th and South Park where McCray upon looking up and seeing the police car began to walk hurriedly between two buildings at about 4847 South Calumet Avenue (Tr. 10, 16). It was at this point that the officers arrested McCray (Tr. 11). Officer Arnold then ordered McCray into the car saying "Get into the car. It is too cold out" (Tr. 17). While he was in the car, the officers made him remove his outer coat (Tr. 17).

It was at this point that McCray attempted to hide the cigarette package with five foil wrapped packets inside (Tr. 17).

The motion to suppress was denied and McCray was convicted as charged without introducing any evidence in his defense at trial (Tr. 19). Illinois Supreme Court affirmed the conviction (Tr. 20-25) and certiorari was subsequently granted by this Court (Tr. 28).

SUMMARY OF ARGUMENT.

The People of the State of Illinois, respondent, submit that the decision of the Supreme Court of Illinois should be affirmed for:

1) An arrest is clearly valid when predicated on the information of a reliable informant which is based on fact and corroborated by the surrounding circumstances. *Draper* v. *United States,* 358 U. S. 307 and *Aguilar* v. *Texas,* 378 U. S. 108.

2) The arrest and search of George McCray was valid for it was predicated upon the substantiated information supplied by a reliable informant.

3) A State is not required to disclose the identity of an informant where he has not participated in the perpetration of the crime and the accused is charged with the possession of narcotics. *Roviaro* v. *United States,* 353 U. S. 53; *Aguilar* v. *Texas,* 378 U. S. 108; *Rugendorf* v. *United States,* 376 U. S. 528; *United States* v. *Ventresca,* 380 U. S. 102.

4) The State is not required to disclose the name of the informer in the case at bar for the standards set forth by this Court in the application of the government privilege of non-disclosure of the idenity of a reliable informant, are based upon sound public policy and are fully satisfied.

5) The conduct of the arresting officers in conducting the search of George McCray was commensurate with the nature of the offense and was not performed in a manner that is shocking to the conscience.

ARGUMENT.

I.

THE ARREST AND SEARCH OF GEORGE McCRAY AND THE SUBSEQUENT SEIZURE OF CONTRABAND FROM HIM WAS CONSTITUTIONALLY VALID FOR IT WAS PREDICATED UPON INFORMATION SUPPLIED TO THE ARRESTING OFFICERS BY A RELIABLE INFORMANT.

Petitioner's initial proposition of law is that, in the absence of a warrant, a valid search and seizure may not be predicated upon an invalid arrest. (Br. 8-10). The People of the State of Illinois fully agree with this principle but state that it is equally well established that a search incident to a valid arrest is proper. *Draper* v. *United States*, 358 U. S. 307, 311; *Weeks* v. *United States*, 232 U. S. 383, 392. Thus if the arrest of George McCray, petitioner, by Officers Jackson and Arnold on the morning of January 16, 1964, was constitutionally valid, the subsequent search and seizure was valid. The initial question presented is, therefore, whether the arrest in this case was in fact a valid arrest.

A.

An arrest is clearly valid when predicated on the information of a reliable informant, which is based on fact, and is corroborated by the surrounding circumstances.

The states are permitted to develop workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation in law enforcement with the one proviso that those rules do not violate

the constitutional proscription of unreasonable searches and seizures. *Ker* v. *California*, 374 U. S. 23, 34.

In accord therewith, Section 107 of Illinois Criminal Law and Procedure (Ill. Rev. Stat. 1963, ch. 38, par. 107) provides in part:

> "A peace officer may arrest a person when
>
> * * * * * *
>
> "(c) He has reasonable grounds to believe that the person is committing or has committed an offense."

This *criterion* for a valid arrest by a police officer without a warrant is the same as that developed and enacted by the Congress of the United States. Rule 41 of Federal Rules of Criminal Procedure; Section 3052 and 3056 of Crimes and Criminal Procedure (18 U.S.C. § 3052 and 3056).

This Court has interpreted the aforementioned *criterion* in relation to the arrest of a person based upon information supplied by an unidentified informant in the recent cases of *Draper* v. *United States*, 358 U. S. 307 and *Aguilar* v. *Texas*, 378 U. S. 108.

In the *Draper* case, in defining probable cause, Mr. Justice Whittaker, quoting and adopting earlier decisions, said (p. 313):

> "Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll* v. *United States*, 267 U. S. 132, 162."

In applying this principle to the facts, in *Draper* this Court noted an experienced federal narcotics agent was told by an informer, whose information the agent had

found to be true and correct in the past, that Draper, whom the agent did not know, was peddling narcotics to several addicts in Denver. Four days later the informant told the agent that Draper had gone to Chicago and was going to return on either the morning of the next day or the morning thereafter with a supply of heroin. The informer gave the agent a detailed physical description of Draper and the clothing he was wearing. Draper did not arrive on the following morning but did arrive on the morning thereafter wearing the precise clothing described by the informant. The agent then arrested Draper, without a warrant, and a subsequent search revealed two envelopes containing heroin.

This Court held that the agent had probable cause to arrest Draper upon the information received from the informant because the informant had been established to be reliable, and especially so in light of the fact his statement was corroborated by other matters within the officer's knowledge.

In *Aguilar* v. *Texas*, 378 U. S. 108, two Houston police officers obtained a state search warrant for narcotics allegedly concealed in Aguilar's home. Their affidavit in support of the application stated that they had received reliable information from a credible person and believed that certain contraband materials were being kept, on the premises, for the purpose of sale and use contrary to the provisions of law. This Court held that the search warrant was invalid but said that if it had been established how the informer had reached his conclusion and evidence of his reliability had been shown, the warrant would have been proper and the arrest valid.

Reading these two cases together there can be no question but that information from an informer constitutes

probable cause to support an arrest and subsequent search and seizure if the following conditions are met. The *first* condition is that there be evidence of the reliability of the informant; *secondly*, there be evidence of how the informer came into possession of the information supplied to the officers; and *thirdly*, the information supplied by the informant be supported by the facts and circumstances attendant to the arrest. If these three *criteria* are met, an officer clearly "has reasonable ground to believe that the person to be arrested is committing or has committed an offense." While it is not believed that all three conditions must be met in any given case, the satisfaction of all three in this cause leaves no other conclusion but that probable cause existed.

B

The arrest and search of George McCray was valid for it was predicated upon corroborated information supplied by a reliable informant.

George McCray was arrested for possession of narcotics on January 16, 1964 at approximately 7:00 A. M. (Tr. 10) in the vicinity of 49th Street and Calumet Avenue in Chicago, Illinois (Tr. 16).

On January 16, 1964, Officers Johnson, Arnold and Nance met with an informant in their car in the vicinity of 47th and Calumet Avenue, Chicago, Illinois between 6:50 and 6:55 A. M. (Tr. 17). The informant told the officers that "Boobie George", who was personally known to them as George McCray, was selling narcotics and had narcotics on his person in the vicinity, where the informant had just observed the petitioner selling narcotics to various people (Tr. 18-19).

Both Officers Jackson and Arnold testified that they had known the informant for over a year (Tr. 8, 15) and that he had supplied them with information concerning narcotics activities which had resulted in numerous arrests and convictions (Tr. 8, 12, 13, 14, 15).

Approximately ten minutes later, after cruising the immediate vicinity, the officers and the informant saw the petitioner at 48th and South Park Avenue (Tr. 10). The informant pointed out the defendant and got out of the car and left (Tr. 10). The officers then followed McCray into an alley at approximately 49th and South Park where McCray upon looking up and seeing the police car began to walk hurriedly between two buildings at about 4847 South Calumet Avenue (Tr. 10, 16). The officers then placed him under arrest and placed him in the car and began the search (Tr. 11, 17). During the course of the search, the officers noticed the petitioner attempting to hide a cigarette package under the back seat (Tr. 11, 17). Officer Arnold recovered the package which contained five foil wrapped packages which contained the contraband in question (Tr. 11, 17).

The arrest of George McCray was constitutionally permissible for it was accomplished in a manner that complied with the three conditions suggested by this Court as a basis for probable cause.

(1) Reliability of Informant.

Both Officers Jackson and Arnold testified that the informant had supplied them with information relating to narcotics activities over a long period of time which had resulted in numerous arrests and convictions.

(2) The Basis of the Information Supplied by the Informant.

The informant told Officers Jackson and Arnold that George McCray was selling narcotics and had the narcotics on his person in the vicinity of 47th and Calumet Avenue. The officers further testified that the informant told them that he knew that this information was true for he had seen McCray selling narcotics to various people just prior to meeting the officers.

(3) Surrounding Facts and Circumstances.

The surrounding facts and circumstances which took place subsequent to receiving the information from the reliable informer corroborated that information. In the first instance, they found the petitioner, whom they knew on sight, in the immediate vicinity. This encounter took place within ten minutes after informant told the officers that the petitioner had narcotics on his person in the area. Upon seeing the police car, the petitioner attempted to evade the police by hurrying between buildings. These circumstances, fully corroborated the information received.

The petitioner suggests that probable cause for arrest should not be permitted where based on information supplied by an informant where the officers have not first obtained an arrest or search warrant (Br. 13-25). They argue that the police are so untrustworthy that probable cause must be determined only by a judge or magistrate (Br. 26, 32).

Petitioner's contention would negate the acts of Congress which make specific provision for arrest without a warrant (Rule 41 of Federal Rules of Criminal Procedure; Sections 3052 and 3056 of Crimes and Criminal Procedure

(18 U. S. C. § 3052 and 3056) and run contra to the decisions of this Court and Federal Courts of Appeals.[1]

Certainly, there are situations which require immediate action of the police, as in the case at bar. The informant had just observed McCray selling narcotics in the vicinity (Tr. 18, 19). The arrest came within ten minutes after the officers learned of the crime (Tr. 10). If they had attempted to secure a warrant it is more than likely that the accused would have left the vicinity or disposed of the contraband material. This was not a situation in which the accused was within his dwelling unit or other specific place in which he may likely have hidden the narcotics. He was working on the street (Tr. 18). Under the circumstances the police were required to make a decision. That decision is whether they had reasonable grounds to believe that the petitioner was committing a crime. As we have established they did have probable cause to arrest the petitioner. Petitioner's contention is without merit.

The arrest of George McCray was valid and in full accord with the statutory and judicial precedent required of an arrest without a warrant. The arrest being valid, the subsequent search and seizure of the contraband narcotics was also constitutionally valid.

---

1. *Draper* v. *United States,* 353 U. S. 307; *United States* v. *Rabinowitz,* 339 U. S. 56; *Mulligan* v. *United States,* 358 F. 2d 604 (C. A. 8th 1966); *Arwine* v. *Bannan,* 346 F. 2d 458 (C. A. 6th 1965); *cert. den.* 382 U. S. 882; *Dailey* v. *United States,* 261 F. 2d 870 (C.A. 5th 1958) *cert. den.* 359 U. S. 969.

II

THE STATE WAS NOT REQUIRED TO DIVULGE THE IDENTITY NOR PRODUCE THE INFORMANT UNDER THE CIRCUMSTANCES IN THIS CASE.

Historically the government possesses a privilege to withhold from disclosure the identity of persons who have furnished information of violations of law to officers charged with the enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of every citizen to inform law-enforcement officials of the commission of crimes and by preserving their identity, encourage them to perform this obligation to society. *Roviaro* v. *United States,* 353 U. S. 53; *Scher* v. *United States,* 305 U. S. 251; *In re Quarles and Butler,* 158 U. S. 532; *Vogel* v. *Graue,* 110 U. S. 311. This privilege is not absolutely right but must be balanced with the rights of the accused. However, we will establish that the governmental privilege should and must be given cognizance under the facts and circumstances in the case at bar.

A.

The state is not required to divulge the identity of an informant where he has not participated in the perpetration of the crime and the accused is charged with possession of narcotics.

In *Roviaro* v. *United States,* 353 U. S. 53, in which Albert Roviaro was indicted on two counts, one the sale of heroin and the second, that he fraudulently and knowingly received, concealed, bought and facilitated the transportation and concealment after importation of heroin, this

Court clarified the privilege and established the standards for its use.

In *Roviaro* this Court said (p. 62):

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In evaluating the facts, the Court held (p. 64) that the identity of the informer was required because the informer was the sole participant, other than the accused, in the transaction charged and further stated (p. 65) that the charge therein was not mere possession.

Roviaro thus establishes, by *dicta*, that the identity of an informer is required to be disclosed only where the informant is a participant in the crime and clearly not where the charge is merely that of "possession". This interpretation has been consistently reiterated and adopted by the federal courts.[2]

---

2. *Garibay-Garcia* v. *United States*, 362 F. 2d 509 (C.A. 9th, 1966); *United States* v. *D'Angiolillo*, 340 F. 2d 453 (C.A. 2nd, 1965), *cert. denied*, 380 U. S. 955 (1965); *United States* v. *Konigsberg*, 336 F. 2d 844 (C. A. 3rd, 1964), *cert. denied*, 379 U. S. 933 (1964); *United States ex rel. Drew* v. *Meyers*, 327 F. 2d 174 (C. A. 3rd, 1964), *cert. denied*, 379 U. S. 847 (1964); *Williams* v. *United States*, 273 F. 2d 781 (C. A. 9th, 1960), *cert. denied*, 362 U. S. 951 (1960); *Miller* v. *United States*, 273 F. 2d 279 (C. A. 5th, 1959), *cert. denied*, 362 U. S. 298 (1960), *Pegram* v. *United States*, 267 F. 2d 781 (C. A. 6th, 1959).

Subsequent to the rendition of the decision in *Roviaro*, this Court considered the question in the case of *Rugendorf* v. *United States*, 376 U. S. 528. In that case the petitioner was convicted of knowingly receiving and concealing 81 stolen fur pieces which had been transported in interstate commerce. The petitioner asserted that he was entitled to the name of the informer who had reported seeing the furs in his basement in order to defend himself because the informant alone knew whether he participated with persons, other than the defendant, in placing the furs in the basement. This Court held that they did not have to reach the issue because the petitioner asserted it for the first time in his reply brief in the Court of Appeals. However by way of *dicta*, it tacitly readopted its holding in *Roviaro*, that the disclosure is required only where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted.

In *Aguilar* v. *Texas*, 378 U. S. 108, this Court reversed the conviction of the petitioner for the crime of possession of narcotics because the affidavit supporting the search warrant did not contain any underlying circumstances relied on by the person providing the information which disclosed that the informant or his information was reliable. In so holding, Mr. Justice Goldberg said (p. 114):

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, *whose identity need not be disclosed*, see *Rugendorf* v. *United States*, 376 U. S. 528, was 'credible' or his information 'reliable.'" (Emphasis added).

Thus the Court again readopted the principle that in the crime of "possession" where the informant is not a participant, his identity is not required to be disclosed.

In *United States* v. *Ventresca*, 380 U. S. 102, the Court held that probable cause existed for the issuance of a warrant for the crime of illegal possession and operation of a distillery. In so holding, Mr. Justice Goldberg adopted and cited his aforementioned quotation from *Aguilar* v. *Texas*, 378 U. S. 108.

Since the decision in *Roviaro* v. *United States*, 353 U. S. 53, this Court has consistently held that the identity of an informer is not required to be disclosed where the informant is not a participant in the crime with the accused and clearly not where the charge is illegal "possession".

It is therefore submitted that if the identity of the informant in the case at bar is required to be disclosed, such a holding would be in direct opposition to the aforementioned cases and it would be required that they be overruled, for in the case at bar, the unidentified informant did not participate, in any manner, in the crime of possession of narcotics of which McCray was convicted.

B.

The state should not be required to disclose the name of the informer, in this case, for the standards set forth by this Court are based upon sound public policy and are fully satisfied.

The ultimate problem presented to this Court is whether the State is required to divulge the identity of an informant, where the informant did not participate in the crime, and the accused was charged with possession of narcotics. Its solution calls for the balancing of the public interest in protecting the flow of information with the fundamental

principle that an individual accused of a crime is entitled to full and fair opportunity to defend himself. *Roviaro* v. *United States*, 353 U. S. 53.

The People of the State of Illinois submit that there are compelling reasons for this Court to reiterate and reaffirm the principles enunciated in the aforementioned cases.

In the first instance, in order that the various federal, state and local law-enforcement agencies may properly preserve the rights and privileges of its citizens, they are required to rely upon information supplied to them by informers. (Harney and Cross, *The Informer In Law Enforcement*, (1960) pp. 6-12). It is difficult to characterize the benefit of society occasioned by this flow of information in a mere numerical or percentile quotation. But we believe that this Court is cognizant that this aspect of crime detection provides a significant portion of arrests and convictions of serious crimes throughout our country. Not only is the use of the informer helpful but perhaps it can be characterized as an integral instrument to maintain the peace and dignity of a community and secure the citizenry in the exercise of their constitutionally guaranteed rights.

Specifically, if we reduce the question in issue to a single informant, it is apparent that if his identity is revealed to the criminal element, the law-enforcement agencies have lost the use of a valuable asset. The informant will henceforth be foreclosed from gathering information which would be necessary or helpful to the police. (Harney and Cross, *The Informer In Law Enforcement*, (1960) p. 63).

The major danger to which this informant would be exposed, if his identity were revealed, is the retaliation which would befall him by the criminal elements who despise him and fear him. (Harney and Cross, *The Informer In Law Enforcement*, (1960) p. 4). The decisions of our courts are

replete with recognition of the fact that an informer literally risks his life by volunteering information to law-enforcement authorities.[3]

Mr. Justice Clark, in *Rovario* v. *United States*, 153 U. S. 53, took cognizance of this situation and observed (p. 67):

> "Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal, once visited upon the informer Larunda, has been found obsolete."

In *Schuster* v. *City of New York*, 5 N. Y. 2d 75, 154 N.E. 2d 534 (C.A. N.Y. 1958), the Court after taking cognizance of the death of an informant, discussed the possibility that not only does a governmental agency have a moral obligation to protect an informant but may have a duty under law to do so.

It logically follows and is well accepted that informers will be unwilling to expose themselves to the aforementioned dangers, by furnishing information, if disclosure of their identity is required. Law which would require

---

3. *United States* v. *Howard*, 228 F. Supp. 939, (U. S. D.C., Nebr. 1964); *United States* v. *Saunders*, 325 F. 2d 840 (C.A. 6th, 1964); *Ferina* v. *United States*, 302 F. 2d 95, (C. A. 8th, 1962) *cert. denied sub. nom.; Cardarella* v. *United States*, 371 U.S. 819; *United States* v. *Paroutian*, 319 F. 2d 66, (C.A. 2nd, 1964), *cert. denied*, 375 U. S. 981 (No. 540 Misc.); *United States* v. *Bando*, 244 F. 2d 833, (C.A. 2nd, 1957), *cert. denied*, 355 U.S. 884; *Carbo* v. *United States*, 288 F. 2d 686 (C.A. 9th, 1961)) *cert. denied*, 365 U. S. 861; *Carbo* v. *United States*, 82 S. Ct. 662, 7 L. Ed. 2d 769, review denied, 369 U. S. 868); *Odom* v. *United States*, 116 F. 2d 996, (C.A. 5th, 1941), reversed 313 U. S. 544.

disclosure of an informers identity would mean the immediate loss of practically all existing and potential informants to the direct detriment of society.

Having established that the informant is an integral and important part of the general enforcement of laws for the benefit of society, the People of the State of Illinois submit that the informant is an absolute necessity for an adequate control of crimes involving narcotics. In the narcotic field, as in any crime where we are confronted with a willing victim, there are usually no complaining witnesses and the only effective manner in which the police can apprehend and convict violators is through the use of information supplied by confidential informants. The traffickers in narcotics are universally unwilling to deal with a stranger, and the difficulties of the law enforcement agent to gain the confidence of an individual engaged in this enterprise can only be characterized as nearly impossible. (Harney and Cross, *The Informer In Law Enforcement* (1960) pp. 18-19).

Mr. Justice Clark observed in *Rovario* v. *United States*, 353 U. S. 53 (p. 66):

> "First, it is well to remember that the illegal traffic in narcotic drugs poses a most serious social problem. One need only read the newspaper to gauge its enormity. No crime leads more directly to the commission of other offenses. Moreover, it is a most difficult crime to detect and prove. Because drugs come in small pills or powder and are readily packaged in capsules or glassine containers, they may be easily concealed. They can be carried on the person or even in the body crevasses where detection is almost impossible. Enforcement is, therefore, most difficult without the use of 'stool pigeons' or informants."

The balancing of the rights within this area presents a dilemma of great consequence. If this Court requires the

disclosure of the identity of a non-participant informer in the crime of possession of narcotics, the police will most certainly be unable to effectively combat one of our most serious social problems to the ultimate detriment of society. In view of the necessity of the utilization of informants, this Court should adhere to the principles which it has previously established and demand the disclosure of the identity of an informant only within the bounds specified therein.

The petitioner alleges that the informant must be produced for the informant could establish that he was not selling narcotics in the vicinity for petitioner testified he was at the home of a friend. He further alleged that disclosure would reveal if the informant actually existed (Br. 24, 38-40).

The allegations can be reduced to the single proposition that the testimony of the informant may reveal that the police were lying. However, an examination of the testimony, in the light of credibility of the witnesses, dispells any circumstances which would reflect any doubt on the veracity of the police officers. Contrary to the testimony of the accused, which was inconsistent, the testimony of the officers was clear, convincing, totally consistent and corroborated.

McCray testified that he was at the home of a friend shortly before he was arrested (Tr. 7). Yet he failed to produce this alleged friend to corroborate this allegation. Even if accepted as true, this allegation does not establish that he was not selling the narcotics in the vicinity of 47th and Calumet shortly before 7:00 A.M. because he testified he left his friends a half hour before 5:30 A.M. (Tr. 7). To establish the petitioner's lack of

credibility, at one point during his testimony he alleged that the cigarette package which contained the contraband material was not his (Tr. 7). Yet he subsequently admitted that it was his packet (Tr. 7).

Perhaps, if on cross examination the petitioner had impeached the officers in some manner which gave rise to a doubt as to their veracity, it could be required that the informer testify in order to clarify the facts. However, such is not the case here, for the testimony of the officers was not impeached.

If the petitioner is permitted to demand the disclosure of the identity of the informer merely by alleging a dispute in the testimony (in this case the fact that he was at the house of a friend), the governmental privilege would be non-existent for it would merely require the accused, who under normal circumstances would do or say anything to retain his freedom, to allege a discrepancy of fact. Such a result would not be based on sound precedural law.

In relation to the contention that he has an inalienable right to cross-examine, we submit that this has been fully exhausted, within the discussion of the balancing of the rights of the accused against the public policy of non-disclosure of an informant's identity and need not be considered here.

The petitioner has completely failed to establish that the identity of the informant was necessary for his defense and therefore the governmental privilege of disclosure was properly applied.

The recent decisions of this Court have consistently held that a governmental agency is not required to divulge the identity of an informant where the informant did not participate in the crime and where the crime is one

of possession. We have established that the welfare of society requires the reiteration and affirmance of this rule for if disclosure is required, the ultimate effect would be disastrous.

III

THE SEARCH OF THE PETITIONER SUBSEQUENT TO HIS VALID ARREST WAS LAWFUL.

The parties agree that if the arrest of the petitioner was valid, the subsequent search and seizure was constitutionally permissible. In Point I of this Brief, we established that the arrest of George McCray was a valid arrest and therefore, Officers Johnson and Arnold were lawfully entitled to search him and seize the contraband narcotics.

The sole remaining question is whether the manner in which the search was conducted was such that it was shocking to the conscience (Br. 9-99).

The petitioner suggests that because of the extremely cold weather that it was incumbent upon the officers to take him to the police station before making the search (Br. 30). While in some situations this may have been possible, it is not when dealing with narcotics.

In *Rovairo* v. *United States*, 353 U. S. 53, Mr. Justice Clark noted (p. 67) that drugs come in small pills or powder and are packaged in glassine capsule containers which may easily be concealed. The possibility of the destruction or secreting of such contraband is ever present. The time of the search is of the essence. In the case at bar this factor is noted by the attempt of the petitioner to hide the contraband under the seat and thus avoid detection (Tr. 17). Every moment that the officers allowed to pass would give the accused that much more of an opportunity to rid himself of the evidence.

In considering petitioner's allegation of shocking conduct on the part of the police officers we must again consider the credibility of the witnesses in relation to the facts surrounding the search. The petitioner alleged that they made him remove his clothing in the squad car and then forced him out of the car with only his underwear and his pants half on (Tr. 7). The officers testified that the search took place within the car and that the petitioner was not removed from the car until they noticed his attempt to hide the packets under the seat. Officer Arnold even said to the accused, "Get in the car. It is too cold out." (Tr. 17).

It is evident from the facts surrounding this arrest that the police officers would have been negligent if they did not conduct a search at the time of the arrest. The search conducted was commensurate with the nature of the crime. It may be unfortunate that it was a very cold morning, but in performing the required search the officers did not perform any acts which a reasonable man could possibly consider to shock the conscience.

Conclusion.

The People of the State of Illinois respectfully pray that the decision of the Supreme Court of the State of Illinois, affirming the conviction of George McCray for possession of narcotics be affirmed.

The People of the State of Illinois have established that the arrest of George McCray was constitutionally valid for it was predicated upon information supplied by a reliable informant, who based this information on personal observation of a crime being committed. The information supplied by the informant was fully corroborated by the

surrounding facts and circumstances attendant to the arrest.

The People of the State of Illinois further established that the State was not required to divulge the identity nor produce the informant in this case for the informant did not participate in any manner in the perpetration of the crime of possession of narcotics of which George McCray was accused. It further established that this application of the governmental privilege of non-disclosure is predicated on sound public policy.

Finally, the People of the State of Illinois established that the search of George McCray, subsequent to the valid arrest, was performed in a manner which was commensurate with the nature of the offense and that the conduct of the officers can not by any means be characterized as shocking to the conscience.

Wherefore, the People of the State of Illinois pray that this Court will affirm the arrest and conviction of the petitioner in order to establish reasonable guidelines and standards for the use of informers in the combat of crime, and especially in the area of narcotic traffic, to the ultimate benefit of all of the People of the United States.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago, Illinois 60601 (FI 6-2000),
Counsel for Respondent.

RICHARD A. MICHAEL,
JOHN J. O'TOOLE,
Assistant Attorneys General,
Of Counsel.

SUBJECT INDEX

	Page
Reasons for Filing an Amicus Curiae Brief	1
Summary of Argument	5
Argument	6
I	
Introduction	6
II	
Precedent	8
A. California	8
B. Prior United States Supreme Court cases	11
C. Other jurisdictions	13
III	
Principle	13
Appendix. Letter from Attorney General Lynch, to Honorable Edmund G. Brown, dated June 24, 1965	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509	11, 12
Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684	8
Martin v. Superior Court, 242 A.C.A. 573, 51 Cal. Rptr. 567	2, 3, 9
People v. Keener, 55 Cal. 2d 714, 12 Cal. Rptr. 859	9, 13
People v. McCray, 33 Ill. 2d 66, 210 N.E. 2d 161	3, 17
People v. McShann, 50 Cal. 2d 802, 330 P. 2d 33	9
People v. Prewitt, 52 Cal. 2d 330, 341 P. 2d 1	14, 15
People v. Woods, 19 Cal. App. 2d 556	2
Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065	12
Priestly v. Superior Court, 50 Cal. 2d 812, 330 P. 2d 39	8, 9, 13
Roviaro v. United States, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623	9, 11
State v. Burnett, 42 N.J. 377, 201 A. 2d 39	13
Miscellaneous	
22 Report of the Assembly Interim Committee on Criminal Procedure, January 1, 1965, No. 8, p. 53	10, 16
Statutes	
California Code of Civil Procedure, Sec. 1881.1	1, 3, 13
United States Constitution, Fourth Amendment	7
Textbooks	
53 California Law Review, p. 855	14
Wigmore on Evidence (McNaughton rev. 1961), Sec. 2374, pp. 761-762	7

IN THE

Supreme Court of the United States

October Term, 1966
Misc. No. 159

GEORGE MCCRAY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois.

BRIEF OF STATE OF CALIFORNIA, AMICUS CURIAE

REASONS FOR FILING AN AMICUS CURIAE BRIEF

For the reasons set forth below the State of California is concerned with, and may be affected by, the ultimate disposition of *McCray v. Illinois* now pending before this Court (No. 159).

The State of California in 1965 enacted a statute, Code of Civil Procedure section 1881.1 which provides as follows:

> "In any preliminary hearing, criminal trial, or other criminal proceeding, for violation of any provision of Division 10 (commencing with Section 11000) of the Health and Safety Code, evidence of information communicated to a peace officer by a confidential informant, who is not a material wit-

ness to the guilt or innocence of the accused of the offense charged, shall be admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure. [Added Stats. 1965 c. 937, p....., § 1.]"

The constitutionality of this legislative enactment by California became the subject matter of litigation and was decided adversely to the State of California in the California District Court of Appeal (see *Martin v. Superior Court*, 242 A.C.A. 573, 51 Cal. Rptr. 567 [1966], which is referred to in the "Brief for Petitioner" at page 74). Subsequent to the rendering of this decision the California Supreme Court granted a hearing thus nullifying the opinion of the District Court of Appeal. (For the effect of a granting of a hearing in the State of California see *People v. Woods*, 19 Cal. App. 2d 556, 560, 65 P. 2d 940 [1937].) This matter was thereafter argued before the California Supreme Court on October 6, 1966, at which time the California Supreme Court deferred the ultimate decision pending the outcome of *McCray v. Illinois* in this Court.

Counsel for the State of California has researched the law of Illinois relative to the disclosure of an informant who is not a material witness on the issue of guilt of the defendant and based on the opinion of the

Supreme Court of Illinois in *People v. McCray* (33 Ill. 2d 66, 210 N.E. 2d 161 [1965]) believes that the rule established by the judiciary in the State of Illinois is comparable to the rule established by the legislative branch of government in California as set forth in Code of Civil Procedure section 1881.1, quoted above. It appears that the highest court of the State of Illinois has declared that the disclosure of the identity of an informant who is not a material witness on the issue of the guilt of the defendant need not be disclosed if there is sufficient evidence presented to the trial judge so as to satisfy the judge, based upon his own independent judgment, that the police officer who relied upon the informant's information properly concluded that the informant was a reliable person and that his information in the case at bar was also reliable. This rule of law is comparable to California Code of Civil Procedure section 1881.1.

In addition to reading the law of Illinois as set forth in the reported cases, counsel for the State of California has read and considered the briefs filed in the Supreme Court of Illinois by the parties in *People v. McCray* and has also read the "Brief for Petitioner" filed by petitioner McCray after certiorari was granted by this Court.

Based on the facts set forth above, counsel for the State of California believes that the ultimate disposition by this Court of *McCray v. Illinois* may be determinative of the cause of action now pending in the California Supreme Court entitled *Martin v. Superior Court.*

The background of the issue now posed in the California Supreme Court has, in part, been summarized in the Brief for Petitioner at pages 63 through 74. We believe, however, that because the summary is not entirely complete and accurate and because the background surrounding the question of disclosure in California is quite different from that surrounding disclosure in Illinois, the filing of an *amicus curiae* brief by the State of California will give this Court an opportunity to consider the experience of another state in attempting to resolve the delicate constitutional questions presented by *McCray v. Illinois,* as well as giving this court an opportunity to evaluate what effect its disposition of *McCray v. Illinois* may have upon states other than Illinois.

For these reasons we set forth below the experience of the State of California and the considerations which California urges this Court weigh in achieving the proper constitutional balance required to decide this case.

SUMMARY OF ARGUMENT

I
INTRODUCTION

Summary of the narrow but vital issue which is discussed in the brief of *amicus curiae* together with the resolution of this issue proposed by *amicus curiae.*

The proper rule we urge be adopted in this case is that a trial court should be permitted to refuse to require disclosure if there is convincing evidence of probable cause for an arrest presented to that court at a hearing during which the defendant is given full opportunity to cross-examine the police in all areas except those which relate directly to the identity of the informant.

II
PRECEDENT

The experience of California with regard to the disclosure of the identity of informants whose information relates solely to probable cause for an arrest and search and seizure incidental thereto together with the prior cases decided by this court indicate that disclosure should not be compelled in every case where such information is relied upon by the police.

III
POLICY

The disclosure of the identity of an informant is not an essential attribute of a fair hearing conducted to determine the existence of probable cause for an arrest based upon information received from an informant.